

NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of HELEN and PHILIP  
ASHLEY.

2d Civil No. B149663  
(Super. Ct. No. DR26099)  
(San Luis Obispo County)

HELEN ASHLEY,

Respondent,

v.

PHILIP ASHLEY,

Appellant.

The trial court denied husband's motion to set aside a portion of a stipulated judgment (Fam. Code, § 2122, subd. (e))<sup>1</sup> and awarded attorneys' fees to wife. We affirm.

FACTS

Philip and Helen Ashley<sup>2</sup> were married in May of 1971 and separated on October 21, 1995. Helen petitioned for dissolution of the marriage.

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<sup>1</sup> All statutory references are to the Family Code unless otherwise stated.

The parties had substantial community property, including two houses, three cars, furniture, tools, musical instruments, and Philip's sick leave and retirement benefits. During a trial, spanning parts of three days, the court made rulings on the division of most of their property. The division, however, would require an equalizing payment of \$13,237.50 from Helen to Philip.

Helen suggested to the trial court that the equalizing payment be made out of her share of Philip's pension. Philip objected. He wanted the residences sold and the equalizing payment taken from the proceeds. The trial court overruled the objection and set a hearing on the pension.

Helen's pension expert, Ronald Reddall, testified at the hearing. Reddall valued the pension as of the date of trial based on 20.06 years of marriage. He admitted that the value of the pension was greater on the date of trial than it was on the date of separation, due to a decline in long term interest rates. Reddall included the value of Philip's sick leave time in determining the value of the pension.

After the hearing, the trial court ruled it would value the pension from its inception in November of 1975 through the date of separation. But it accepted Reddall's valuation which was calculated to the date of trial and based on 20.06 years. The trial court also ruled that Philip should pay one-half of his accrued sick leave to Helen. The court continued the matter to April 14, 1998, to consider support and attorneys' fees.

When the parties appeared on April 14, 1998, they stipulated to a judgment dividing their community property. The stipulation included the court's prior rulings as to the evaluation of the pension and division of accrued sick leave. Philip appealed the stipulated judgment.

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<sup>2</sup> Hereafter we refer to the parties by their first names, not out of disrespect, but to ease the reader's burden.

While the appeal was pending, Philip made a motion to set aside the judgment pursuant to section 2122, subdivision (e). The trial court dismissed the motion on the ground it had no jurisdiction while the matter was under appeal.

We affirmed the judgment on the ground that Philip could not successfully appeal a stipulated judgment. (*Ashley v. Ashley* (June 26, 2000, B130786) [nonpub. opn.].) We stated in the opinion that the trial court could entertain Philip's motion to set the judgment aside on remittitur.

After remittitur, Philip renewed his motion to set aside the portion of the judgment affecting the division of his retirement and sick leave.

In support of his motion, Philip declared that prior to his stipulation his attorney advised him that he had to stipulate to the court's prior rulings on his pension and sick leave or he would be sanctioned. His attorney also advised him that if he stipulated he could appeal the errors underlying those rulings. Philip said that at the time of the stipulation he was under the care of a psychologist for emotional duress.

Philip claimed the trial court's rulings were in error in that: the court accepted an evaluation of the pension as of the time of trial rather than as of the date of separation; the court used 20.06 years instead of 19.93 years as the community service credit years for the pension; and the court credited Helen with half of Philip's sick leave, even though sick leave was taken into account in evaluating the pension. Philip also claims that using the pension to make an equalizing payment will result in a 40-year deferral of the payment.

Philip's trial counsel submitted a declaration in support of the motion. He declared in part: "Minutes prior to the April 14, 1998 hearing, I advised [Philip] that since the Court ordered the use of the pension for [Helen] repaying [Philip] the equalizing payment, and the use of the trial date valuation of the pension, that it was

appropriate to agree to a division of property based on those orders and then later the Court's ruling with respect to the pension could be appealed by [Philip]."

Helen opposed Philip's motion on the ground that the motion was untimely, having been brought more than a year after the stipulated judgment. In addition, Helen opposed the motion on the ground that Philip acknowledged on the record at the time he entered into the stipulation that he understood it. Helen argued there was no evidence Philip was under any greater duress than the typical party to a dissolution proceeding.

The trial court denied Philip's motion to set aside a portion of the judgment and awarded Helen \$2,500 in attorneys' fees.

## DISCUSSION

### I

Section 2122, subdivision (e) allows the trial court to set aside all or part of a stipulated judgment that was the result of a mutual or unilateral mistake of law or fact. The motion must be brought within one year after the date of entry of judgment.

Helen contends Philip's motion was not timely. Judgment was entered in February of 1999. Philip filed a motion to set aside the judgment in December of 1999. That motion was timely, but the trial court dismissed it for lack of jurisdiction because the judgment had been appealed. We issued a remittitur in October of 2000 and Philip renewed his motion in November of 2000.

Code of Civil Procedure section 916, subdivision (a) provides in part that "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from . . . ." But the stay suspends the trial court's jurisdiction only "until the appeal has been determined and the remittitur from the appellate court has been filed in the trial court." (*Swan v. Riverbank Canning Co.*

(1947) 81 Cal.App.2d 555, 558.) Thus our previous opinion expressly provided that Philip could renew his motion after remittitur.

Philip's renewed motion relates back to the original motion. Because the original motion was timely, the trial court had jurisdiction to consider the renewed motion.

Contrary to Philip's assertion, however, there is nothing in the record to show the trial court denied his renewed motion because of lack of jurisdiction. At oral argument Philip's counsel conceded the court knew it had jurisdiction to decide the motion. The trial court allowed the parties to argue sanctions. It did not allow oral argument on the other issues but stated it reviewed the moving papers and found no merit. The minute order contains a denial of the renewed motion without explanation.

Under the circumstances, the trial court's order is presumed correct. (*Kunzler v. Karde* (1980) 109 Cal.App.3d 683, 688.) We must indulge in all intendments and presumptions that are not contradicted by the record to uphold the order on appeal. (*Ibid.*) One such presumption is that the trial court found all facts necessary to support the judgment or order. (*Hochstein v. Romero* (1990) 219 Cal.App.3d 447, 451, fn. 4.) This means we must presume the trial court did not find credible Philip's claim of mistake or duress. It is no answer to say the facts are uncontradicted. The trial court as the finder of fact may reject even uncontradicted evidence. (See *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1028.) Philip has failed to show the trial court erred.

## II

Philip contends the trial court erred in awarding Helen \$2,500 for attorneys' fees. The trial court gave no reason for awarding the fees. Helen argues they are justified under section 271. Section 271 allows the trial court to award fees as a sanction for frustrating the policy of promoting settlement.

Philip argues such sanctions are not justified under the facts of this case. But as we have stated, we must assume the trial court did not find Philip's explanation for trying to set aside the stipulated judgment credible. That is sufficient to support an award of sanctions for frustrating the policy of promoting settlement.

Philip argues the trial court did not consider his ability to pay. But the court was aware of Philip's financial status due to previous litigation concerning spousal support and property division. Philip points to nothing in the record to show the trial court did not consider his ability to pay.

The judgment (order) is affirmed. Costs are awarded to respondent.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Carol K. Allen, Temporary Judge\*

Superior Court County of San Luis Obispo

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John F. Hodges for Appellant.

Robert H. Mott for Respondent.

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\*(Pursuant to Cal. Const., art. VI, § 21.)